92-1457

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DR JULIUS J. LARRY, III, D.D.S., J.D.; DR. ABDUL-HAKIM AHMED, D.D.S. J.D.; DR. JOSEPH R. WILLIE, II, D.D.S., J.D.,; AND GULF STATE DENTAL ASSOCIATION OF TEXAS, INC.,

Petitioners,

v.

MARK WHITE and in His Official Capacity, ET AL.,

Rrespondents

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

U. LAWRENCE BOZÉ
Counsel of Record
U. LAWRENCE BOZÉ AND ASSOCIATES
2208 Blodgett
Houston, Texas 77004
(713) 520-0260

Attorney for Petitioners

Alpha Law Brief Co. • 6113 Aletha Lane • Houston, Texas 77081 (713)981-9000

QUESTIONS PRESENTED

1. IS THE APPELLATE COURT CORRECT IN REQUIRING BLACK AFRICAN AMERICAN DENTISTS, IN EQUAL PROTECTION AND 42 U.S.C § 1983 CLAIMS, TO PRESENT "*DIRECT EVIDENCE*" OF RACIAL DISCRIMINATION AND "*PREJUDICIAL RACIAL ANIMUS*", IN ORDER TO DEFEAT A MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN THE WHITE DENTISTS IN *PEKARSKY V. ARIYOSHI*, 695 F.2d 352 (9th Cir. 1982), WERE NOT REQUIRED TO PRESENT THE DISTRICT COURT WITH *DIRECT* EVIDENCE OF RACIAL DISCRIMINATION IN DENTAL LICENSURE? [See, *Washington v. Davis*, 426 U.S. 229 (1976)].

2. IS IT THE FUNCTION OF THE DISTRICT COURT, IN RULING ON A MOTION FOR PARTIAL SUMMARY JUDGMENT, TO WEIGH EVIDENCE; ASSESS CREDIBILITY; WEIGH STATISTICS OR DETERMINE THE MOST REASONABLE INFERENCES TO BE DRAWN FROM THE EVIDENCE? (See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Honore v. Douglas*, 933 F.2d 565 (5th Cir. 1987)].

3. MAY THE AFFIRMATIVE DEFENSES OF "RES JUDICATA" AND "CLAIM PRECLUSION" BE RAISED FOR THE FIRST TIME, IN A MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN THEY WERE NOT RAISED IN THE FIRST INITIAL RESPONSIVE PLEADING? [See, *U.S. v. Burznski Cancer Research Institute*, 819 F.2d 1301 (5th Cir. 1987)].

4. DID PETITIONERS MAKE OUT A PRIMA FACIE CASE OF DISSIMILAR TREATMENT WHICH VIOLATED THE 14TH AMENDMENT EQUAL PROTECTION CLAUSE? [(See, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982); *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981)].

5. SHOULD THE COURT HAVE APPLIED THE "STRICT SCRUTINY" STANDARD OF REVIEW TO PETITIONERS' CLAIMS OF RACE-BASED DISCRIMINATION AND DISSIMILAR TREATMENT RATHER THAN THE "RATIONAL BASIS TEST"? [See, *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984)].

6. SHOULD THE DISPARATE IMPACT ANALYSIS IN *Watson v. Ft. Worth Bank & Trust*, 108 S.Ct. 2777 (1988) ALSO APPLY TO INSTITUTIONALIZED RACIAL DISCRIMINATION IN PROFESSIONAL LICENSURE, INCLUDING DENTAL LICENSURE?

7. DID PETITIONERS PREVAIL ON A SIGNIFICANT ISSUE IN THE LITIGATION, ENTITLING THEM TO AN ATTORNEYS' FEES AWARD UNDER 42 U.S.C. § 1988? [(See, *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989)].

LIST OF ALL PARTIES

PETITIONERS

1. DR. JULIUS J. LARRY, III, D.D.S., J.D.
2. DR. ABDUL-HAKIM AHMED, D.D.S., J.D.
3. DR. JOSEPH R. WILLIE, II, D.D.S., J.D.
4. GULF STATE DENTAL ASSOCIATION OF TEXAS, INC.

RESPONDENTS

3. MARK WHITE
4. WILLIAM S. NAIL
5. RENE HOLT, D.D.S.
6. WILL GRAHAM, D.D.S.
7. JACK CLARK, D.D.S. (DECEASED)
8. BRIAN BABIN, D.D.S.
9. LUTHER BOLTON, D.D.S.
10. WILLIAM KEMP, D.D.S.
11. RANDOLPH MINATRA, D.D.S.
12. JAMES FOSTER, D.D.S.
13. HUGH PIERPONT, D.D.S.
14. JOHN WILBANKS, D.D.S.
15. FRANK SANTOS, D.D.S.
16. JOSEPH GARDENER
17. GERALDINE TUCKER
18. EVELYNNE VICK

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No._____

IN THE

Supreme Court of the United States

October Term, 1992

DR. JULIUS J. LARRY, III, D.D.S., J.D.; DR. ABDUL HAKIM AHMED, D.D.S., J.D.; DR. JOSEPH R. WILLIE, II, D.D.S., J.D; AND GULF STATE DENTAL ASSOCIATION OF TEXAS, INC.,

Petitioners,

v.

MARK WHITE, Individually and in His Official Capacity, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit and the district court in this proceeding on November 18, 1992 and July 28, 1989, respectively.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals reported as, *Larry v. White*, *929 F.2d 206* (5th Cir. *1991*), appears in Appendix A hereto along with the opinion and order of the District Court for the Southern District of Texas, Houston, Division. (Appendix B).

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fifth Circuit were entered April 24, 1991. A timely **Petition for Rehearing** was denied November 18, 1992, and a copy of such order is also included in Appendix C. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

14th Amendment Equal Protection Clause

42 U.S.C. § 1983 states, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

> proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. § 1988(b), states in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

Since 1889, the all-white Texas dental examiners have discriminated against Black dental applicants for dental licensure in the State of Texas. Since 1889, no more than (200) two hundred Black dentists have ever been licensed to practice dentistry at any given time. This illegal quota system has kept the number of Black practicing dentist around 200, year after year. At the time this suit was filed, there were less than 200 Black licensed, practicing dentists in the entire State of Texas. From 1889, to the filing of this lawsuit, there had been only (1) one Black dental examiner, ever.

Dr. Julius J. Larry, III, D.D.S., J.D., a Black African American native of Savannah, Georgia, and Dr. Abdul-Hakim Ahmed, D.D.S., J.D., a Black African American native of Houston, Texas, applied for dental licensure in Texas in 1983 and 1984, respectively. They

objected to the dental examiners' application form because it required them to state their *race*, *skin complexion*, *dental school* and *attach a photograph*. (See Appendix D). These requirements were mandatory, but the information is not used for statistical or other governmental purposes. The dental examiners claimed to have an "anonymous grading system", but Black dental applicants were never "anonymous". Drs. Larry and Ahmed believe the application to be unconstitutional on its face. The Fifth Circuit Court of Appeals did not address this issue, although the issue was properly before the Court. The Fifth Circuit obtained jurisdiction of this case pursuant to 28 U.S.C. § 1291.

Over the years, the dental examiners created a hodge-podge of unwritten rules used to fail Black applicants. The dental examiners have an official Examiners' Manual, but they choose to utilize the arbitrary, unwritten rules when grading Black applicants. The arbitrary application of these unwritten rules has caused a disparate impact on Black dental applicants and adversely effected the number of Black licensed dentists in the State of Texas. (See Appendix E/F).

The "deep-check" rule and the "white-slip" rule are two examples of unwritten rules used by the dental examiners to fail Black applicants. The dental examiners fail Black applicants alleging "loose enamel rods" - which cannot be seen with the naked eye. (Enamel rods are 8 angstroms in diameter and can only be seen with an electron microscope). The magnitude of the problem extends nationwide. A Black dental applicant taking the Florida dental licensure examination was failed for allegedly leaving "loose enamel rods" on a plastic tooth! The respondent, dental examiners have admitted that they are arbitrary, but claim to be "arbitrary regardless of race".

Drs. Larry and Ahmed filed suit against the dental examiners, individually and in their official capacities, for violating their 14th amendment rights to equal protection. Petitioners were victims of dissimilar treatment in comparison to their white counterparts who were similarly situated, taking the June 1984 licensure exam. Petitioners also filed claims under 42 U.S.C. § 1981; § 1983; § 1985; § 1986 and § 1988. The Fifth Circuit Court of Appeals did not adequately address the equal protection issue, although that issue was properly before the Court.

The Fifth Circuit Court of Appeals did not address the standard of review for race-based discrimination. The Fifth Circuit erroneously required Petitioners to present *direct evidence* of racial discrimination. The district court erroneously required Petitioners to present evidence of a "prejudicial animus of the Board's examiners". No caselaw was cited for either proposition.

The district court correctly found that a genuine issue of material fact had been raised by Petitioners as to "whether or not from these figures [statistics] it is reasonable to infer racial discrimination". The district court erroneously weighed the evidence and statistics and drew inferences and concluded that there was no evidence of a "prejudicial racial animus". The court granted summary judgment in favor of respondents, although their motion requested a partial summary judgment.

Drs. Larry and Ahmed were stopped on their examinations by the dental examiners, prior to the 12 noon deadline. White applicants were allowed to go past the 12 noon deadline "a few days". One white applicant was allowed to finish his official Texas licensure examination (11) eleven days after the June 1984 exam ended. The Fifth Circuit did not see any problem with stopping Black

applicants early, while allowing white applicants to continue past the deadline. One white applicant completed his official exam in a dental examiner's private dental office, after having his examination dental bridge checked by a Crown and Bridge specialist at the University of Texas dental school. This incident took place on the June, 1984 exam.

A miscarriage of Justice has taken place in Texas dental licensure; it is continuing and capable of repetition, but has evaded review for over 100 years - until today. The disparate impact analysis set out in *Watson v. Ft. Worth Bank and Trust*, 108 S. Ct. 224 (1988), should also be applied to reach institutionalized racial discrimination in professional licensure, including dental licensure in Texas. A license to practice any profession is a condition of employment. Without a license, dentists could not be gainfully employed. The primary reason for obtaining a license in any profession is to become employed.

Although *Watson* is a Title VII case, there is nothing prohibiting the disparate impact analysis from applying to professional employment. As a matter of public policy, racial discrimination anywhere, whether or not done intentionally, must be eradicated. Dental examiners are not exempt from the mandates of the Constitution or the manifested intent of Congress. Accordingly, Petitioners seek review of the Fifth Circuit Court of Appeals' judgment and district court's judgment in this matter.

REASONS FOR GRANTING THE WRIT

1. THERE IS A SPLIT BETWEEN THE CIRCUITS REGARDING THE REQUIREMENTS FOR PROVING "DISCRIMINATORY INTENT" IN DENTAL LICENSURE, UNDER 42 U.S.C. § 1983 AND THE 14TH AMENDMENT EQUAL PROTECTION CLAUSE. THE

FIFTH CIRCUIT COURT OF APPEALS' REQUIREMENT THAT DRS. LARRY AND AHMED PRESENT *'DIRECT EVIDENCE'* OF RACIAL DISCRIMINATION AND EVIDENCE OF "PREJUDICIAL RACIAL ANIMUS" IS CONTRARY TO THIS COURT'S DECISION IN *Washington v. Davis*, 426 U.S. 229 (1976).

2. THE NINTH CIRCUIT COURT OF APPEALS DECIDED A VIRTUALLY IDENTICAL CASE IN, *Pekarsky v. Aryoshi*, 695 F.2d 352 (9th Cir. 1982). IN THAT CASE, WHITE DENTISTS SUED THE DENTAL EXAMINERS OF THE STATE OF HAWAII FOR DISCRIMINATION BASED ON THEIR RACE. THEY UTILIZED STATISTICS WHICH ACTUALLY SHOWED A DISPARATE IMPACT ON WHITE APPLICANTS AS COMPARED TO ASIAN APPLICANTS. THE PLAINTIFFS WERE NOT REQUIRED TO PRESENT *DIRECT EVIDENCE* OF RACIAL DISCRIMINATION NOR WERE THEY REQUIRED TO PRESENT EVIDENCE OF A "PREJUDICIAL ANIMUS OF THE BOARD'S EXAMINERS".

3. THE FIFTH CIRCUIT COURT OF APPEALS DID NOT ADDRESS THE ISSUES OR ADEQUATELY ADDRESS THE ISSUES PROPERLY BEFORE IT FOR RESOLUTION.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S GRANTING OF RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PETITIONERS' 14TH AMENDMENT EQUAL PROTECTION AND 42 U.S.C. § 1983 CLAIMS.

INTRODUCTION

After Petitioners "pulled themselves up by their bootstraps" and earned professional degrees, Petitioners were denied employment and a livelihood because of the built-in headwinds of institutionalized racial discrimination in professional licensure. Millions of dollars of student loans go to waste because Black African American dentists and physicians are failed on licensure examinations. Some pursue other professions. Others travel to distant states and take the licensure exam. Many re-take the exam, to no avail, then leave the state.

Many state boards of dental examiners are hostile toward Black applicants, and especially those from out-of-state schools. The problem is national in scope and affects all types of licensure examinations, including hospital privileges and residency programs for minority doctors.

ISSUE 1

IS THE APPELLATE COURT CORRECT IN REQUIRING BLACK AFRICAN AMERICAN DENTISTS, IN EQUAL PROTECTION AND 42 U.S.C § 1983 CLAIMS, TO PRESENT "*DIRECT EVIDENCE*" OF RACIAL DISCRIMINATION AND "*PREJUDICIAL RACIAL ANIMUS*", IN ORDER TO DEFEAT A MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN THE WHITE DENTISTS IN *PEKARSKY v. ARIYOSHI*, 695 F.2d 352 (9th Cir. 1982), WERE NOT REQUIRED TO PRESENT THE DISTRICT COURT WITH *DIRECT EVIDENCE* OF RACIAL DISCRIMINATION IN DENTAL LICENSURE? [See, *Washington v. Davis*, 426 U.S. 229 (1976)].

The panel who heard this case issued its opinion containing the following statement: "Neither Dr. Larry nor Dr. Ahmed presented the district court with *direct evidence* of racial discrimination". (Opinion - p. 3450). Petitioners could find no caselaw where the presentation of "direct evidence of racial discrimination" was mandated. Petitioners believe that discriminatory intent may be inferred and that it was error to hold Drs. Larry and Ahmed to presenting direct evidence. In *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, L. Ed.2d 597 (1976), this Court held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Nowhere in *Davis* did the Supreme Court say that discriminatory intent had to be proven by "direct evidence".

The Court stated that, "necessarily, invidious discriminatory purpose *may often be inferred* from the totality of the relevant facts, including the fact, if it is true, that the *law bears more heavily on one race than another*". Justice Stevens, in his concurring opinion in *Davis*, stated that "frequently, the *most probative evidence of intent* will be objective evidence of *what actually happened* rather than evidence describing the subjective state of mind of the actor. It is unrealistic,..., to require the victim of alleged discrimination to uncover the actual subjective intent of the dicisionmaker...".

Petitioners researched the Fifth Circuit cases and could not find a dental licensure discrimination case based on 14th Amendment Equal Protection claims, dissimilar treatment or disparate impact. However, they found a Ninth Circuit case that is on all-fours with the present case.

In *Pekarsky v. Ariyoshi, individually and in his capacity as Governor, State of Hawaii; Wayne Minami,*

individually and in his capacity as Director of Regulatory Agencies, State of Hawaii; Herbert Chun, individually and in his capacity as Executive Secretary for the Board of Dental Examiners, Department of Regulatory Agencies, State of Hawaii, 695 F.2d 352 (9th Cir. 1982), plaintiffs brought a class action civil rights suit on behalf of all Caucasians and new or non-residents of Hawaii who had failed to pass the Hawaii State dental licensure examinations between 1974 - 1979.

The parties entered into a Stipulation and Agreement of Settlement which provided for the payment of damages by the Dental Board defendants, modification of examination procedures, and expungement by the State of Hawaii of the records of class members who had failed past examinations. After the settlement was approved by the court, appellees (plaintiffs) moved under 42 U.S.C. § 1988 for an award of attorneys' fees against the appellants. The court concluded that appellees did prevail against the dental examiners, thus justifying an award of attorneys' fees.

The plaintiffs' suit was based on two observations: (1) the Dental Board defendants and appellants were predominantly long-term residents of Asian ancestry and (2) the percentage of Asian Americans and long-term residents who passed the dental licensure examination was substantially greater than the percentage of Caucasians and new or non-residents who passed.

In the *Pekarsky* case, the dental examiners sent a questionnaire to the board of dental examiners in each of the other 49 states requesting information on resident and non-resident pass rates. Nine (9) states responded with data on resident and non-resident pass rates. The data showed that from 1972 to 1979, the resident pass rate ranged from 1.7 to 2.5 times the non-resident pass rate. (See Statistics below from ***Pekarsky***).

PASS RATES FOR DENTAL EXAMINEES

YEAR	ASIANS	NON-ASIANS	RATIO
1974	68.8	45.9	1.50
1975	86.7	28.9	3.00
1976	78.3	25.0	3.13
1977	72.0	26.3	2.74
1978	65.5	44.0	1.49
1979	67.7	39.1	1.73
1980 FEB	77.7	23.5	3.31
1980 AUG	85.7	31.8	2.69

YEAR	RESIDENTS	NON-RESIDENTS	RATIO
1974	59.3	46.2	1.28
1975	61.9	33.3	1.86
1976	76.2	28.6	2.66
1977	70.6	34.8	2.03
1978	61.1	44.2	1.38
1979	65.7	38.5	1.71
1980 FEB	77.7	23.5	3.31
1980 AUG	78.9	41.7	1.89

Petitioners' statistics show drastically higher ratios of pass rates involving University of Texas and Baylor (in-state) versus Meharry and Howard University (out-of-state). The in-state pass rate ranged from 1.2 to 8.3 times the out-of-state pass rate. The median pass ratio for in-state versus Meharry is 3.6 times, between 1975 and 1984, inclusively.

PASS RATES AND RATIOS (UT-Meharry)

	University of Texas	Meharry	Ratio	Mean Ratio
1975	93%	16%	5.8	3.7
1976	96	66	1.5	(1975-84)
1977	88	50	1.8	
1978	97	0*	---	
1979	100	12	8.3	
1980	95	25	3.8	
1982	93	50	1.9	
1983	94	50	1.9	
1984	90	25	3.6	

* All Meharry applicants were failed.

PASS RATES AND RATIOS (Baylor - Meharry)

	Baylor	Meharry	Ratio	Mean Ratio
1975	79%	16%	4.9	3.4
1976	92	66	1.4	(1975-84)
1977	94	50	1.9	
1978	84	0*	---	
1979	88	12	7.3	
1980	98	25	3.9	
1981	92	50	1.8	
1982	83	50	1.7	
1983	91	25	3.6	
1984	86	20	4.3	

*All Meharry applicants were failed.

PASS RATES AND RATIOS (UT - Howard U.)

	University of Texas	Howard	Ratio
1975	93%	100*	---
1976	96	0**	---
1977	88	0**	---
1978	97	71	1.4
1979	100	0**	---
1980	98	40	2.5
1981	92	49	1.9
1982	83	0**	---
1983	91	15	6.1
1984	86	42	2.0

*One applicant took the exam and passed.
**All Howard applicants were failed.

PASS RATES AND RATIOS (Baylor - Howard U.)

	Baylor	Howard	Ratio
1975	79%	100*	---
1976	92	0**	---
1977	94	0**	---
1978	84	71	1.2
1979	88	0**	---
1980	98	40	2.5
1981	92	49	1.9
1982	83	0**	---
1983	91	15	6.1
1984	86	42	2.0

*One applicant took the exam and passed.
**All Howard applicants were failed.

As in the *Pekarsky* case, respondent, dental examiners are also graduates of University of Texas (UT) and/or Baylor and have a vested interest in protecting the pass rates of their alma maters. At the inception of this suit, there were no Black dentists on the board of dental examiners of Texas, nor was there a dental examiner who was a graduate of Meharry or Howard, to protect the interest of those predominantly Black dental schools.

These statistics of in-state pass ratios reflect disparate impact on protected minorities, on their face. It is this type of unchecked racial discrimination that has evaded review, and kept the number of Black dentists in Texas under 200, since 1889, while discouraging other Black dentists from coming to Texas.

Petitioners sent a survey to all of the dental boards in the United States, including the Virgin Islands. The response was overwhelming in that a majority of the dental examiners in the United States would not have given a license to an applicant who dropped a gold bridge down his exam patient's throat on the licensure examination. Nor would they allow an applicant to complete his official State licensure exam in a board member's private dental office.

Indeed, respondent, Dr. Brian Babin, testified in his oral deposition in this case, that he would not have licensed the white applicant in the negligent bridge-swallowing incident. However, Dr. Babin's signature appears on the applicant's license.

ISSUE 2

IS IT THE FUNCTION OF THE DISTRICT COURT, IN RULING ON A MOTION FOR PARTIAL SUMMARY JUDGMENT, TO WEIGH EVIDENCE; ASSESS CREDIBILITY; WEIGH STATISTICS OR DETERMINE THE MOST REASONABLE INFERENCES TO BE DRAWN FROM THE EVIDENCE? (See, *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242 (1986); *Honore v. Douglas*, 933 F.2d 565 (5th Cir. 1987)].

Summary judgment disposition is inappropriate if the evidence before the Court, viewed as a whole, could lead to different factual findings and conclusions. It is not the function of the trial judge in ruling on a motion for summary judgment, to weigh evidence, assess credibility, or determine the most reasonable inferences to be drawn from the evidence. Those are functions of the trier of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987).

When Courts inappropriately engage in weighing evidence; drawing inferences from statistics and creating facts not in evidence, the result is usually an erroneous, factually inaccurate "opinion", as evidenced in this case. The court attempted to set out what purports to be the *Facts and Proceedings Below*. However, the inaccuracies have totally changed the facts, to the detriment of Petitioner Larry. For example, the Court states: "Dr. Larry, black and a graduate of Meharry School of Dentistry in Nashville, Tennessee, who practiced dentistry in the United States Army for six years, *completed and failed the Texas dental licensing examination twice*, once in August 1983 and again in June 1984. That assertion of "facts" by the Court is wholly

inaccurate. Dr. Larry was *not allowed* to complete either the August 1983 or June 1984 exams. He was stopped. The very basis of Dr. Larry's claims goes to dissimilar treatment among similarly situated dental applicants. Board records show that Dr. Larry was stopped and failed in August 1983 and June 1984. However, some white applicants were allowed to continue their exams past the deadline, with Dr. Larry having been "stopped" before the time expired. One white applicant was allowed 11 extra days to complete his licensure exam. (June 1984 exam).

The Court erroneously asserted in its opinion that "the examination consists of *three parts* that are taken over the course of three and one-half days". The Board records and official Examiner's Manual state: "The Dental examination is divided into *four major sections*: Jurisprudence, Denture Set-up, Diagnosis and Treatment Plan and the Clinical Section".

The Court has miraculously "created" its own set of facts. Nowhere in the Boards' record can it be shown that Dr. Larry failed the August 1983 exam "because of his error in preparing to lay a base over decay".

The undisputed evidence shows that Dr. Larry called for a "deep-check" because he was 'getting close to the nerve of the tooth'. He did not have a nerve exposure. There was still decay in the tooth - which is why he called for the deep-check in the first place. Board records show that Dr. Larry was failed as follows:

Morgan - LR5 - loose enamel rods on gingival box; decay left in box
LR6 - decay in deep part of occlusal prep - Decay left in both preps

Babin - LR5 - decay left in; did not break contact in distal box of LR6

Holt - LR5 & 6 - decay left in preps

Graham - active decay remain in the cavity LR6, distal box not sufficiently extended

Clark - LR6 - MOD - remaining decay
1st Examiner stated candidate wanted to base over decay.

How the Court construed Dr. Clark's remarks referring to the "1st Examiner" as the basis of Dr. Larry's failure, is totally inexplicable. Dr. Clark's statement consists of hearsay within no exception to the hearsay rule. "Dr. Clark stated that the 1st examiner stated that the candidate stated that he wanted to base over decay." Moreover, the 1st examiner (Dr. Morgan) did not mention a failure based on "laying a base over decay". Unfortunately, the Court, after 10-months on submission, pulled a few pages directly from the appellees' brief and constructed an "opinion" of "created facts" and "hypothetical situations" that did not exist in actuality. Unfortunately, this is what results when the Court weighs evidence and decides disputed facts.

The Court made the following erroneous statement: "Dr. Larry maintains that because the examination was not supposed to end until noon, *he had nothing to show the examiners*".

That statement is wholly false and controverted by the Board's records. The undisputed evidence states the following:

Bolton - App. stopped - precementation - no patient present @ 10:05.

Babin - DDS feels harassed - was asked for bridge at 8:40 by Bolton - did not show it right away - did show it to Babin/Bolton after he went in lab, produced a casting w/sprue at that time.

Amazingly, the Court disregarded the actual summary judgment proof and "created" its own version of how the Court felt the "facts" should have been, in order for respondents to prevail. The court, in error, made the following "created" statement:

"Appellees maintain that Dr. Larry failed this portion of the examination because he did not complete his dental bridge by the termination of the examination at noon."

This assertion is wholly false and not supported by any evidence. Appellees *never* maintained that Dr. Larry failed because of the 12 noon deadline! He was stopped at 8:40 a.m. and again at 10:05 a.m. Dr. Larry was sent to the Boardroom and never allowed to proceed to 12 noon. Incidentally, not only was Larry failed on "this portion of the examination", as the Court "created". Dr. Larry was failed on the *entire* examination, although Board records show 5 passing grades. It takes 4 passes to be licensed in Texas, according to the Respondent, dental examiners.

The Court grossly misinterpreted Dr. Larry's statistics. These "pure Black and white" statistics were derived from the Board's records of all examinations given in Texas from 1975 through 1984. In fact, this study was one of the most comprehensive studies performed. The Court called it "skimpy". (See, Appendix E).

The white graduates of Meharry and Howard were excluded from the study. All Black graduates of University of Texas and Baylor were excluded. All "other" graduates

from Meharry, Howard, UT and Baylor were excluded. All Hispanics were excluded. The study was "pure Black" and "pure white". Baylor's dental licensure exams were 100% white in this study. The University of Texas at San Antonio and Houston were 100% white. Meharry and Howard were 100% Black.

The statistics are "race-specific" for Black and white, with all other races factored out. The disproportion in this case is as dramatic as in *Gomillion v. Lightfoot*, 364 U.S. 339 or *Yick Wo v. Hopkins*, 118 U.S. 356 or *Pekarsky v. Ariyoshi*, 695 F.2d 352 (9th Cir. 1982).

The amicus brief contained statistics that started where Dr. Larry's statistics ended. These statistics show the highest percentage pass rate for Blacks in the history of the Texas dental licensure exam. Mysteriously, after Summary Judgment was granted in favor of the dental examiners in 1989, the dental examiners resumed their usual course of business and the pass rate of Blacks dropped accordingly. (See Appendix E).

Finally, the Court suggests that Meharry and Howard are less academically rigorous than Baylor and the University of Texas and that the inference might be drawn from the statistics. However, nowhere in the entire (9) nine volume record, is there one iota of evidence that Meharry and Howard are "less academically rigorous than Baylor and the University of Texas". The Court is reminded that Dr. Dana Boehm, the white dentist who negligently dropped a 3-unit gold bridge down his exam patient's throat, is a graduate of the University of Texas. Dr. Larry, a graduate of Meharry, stated that Meharry taught him to "drape" the patient's throat when trying-in gold bridges or gold inlays. If precautionary measures are not taken, a patient could die from aspirating a dental bridge.

Ironically, Dr. Larry was stopped and failed and Dr. Boehm was given a dental license after completing the exam "a few days" following the end of the examination period. The "few days" amounted to 11 days and the final procedures took place in a Board member's private dental office, according to the undisputed evidence - not considered by the Fifth Circuit. Apparently, the Court saw nothing wrong with stopping Black applicants before the 12 noon deadline and allowing white applicants to continue their exams for "a few days" after the exam ended for Blacks.

The Court also decided to take Dr. Larry's claim of harassment as true, but reasoned that he had not "shown the harassment was racially motivated or that Babin or Bolton displayed any racial hostility toward him". In footnote 14, the Court claims that the evidence indicates that Babin and Bolton thought Dr. Larry had taken the bridge of another examinee, whose bridge the undisputed evidence showed had mysteriously disappeared". The Court's assertions are incredible! There is no evidence, anywhere, that states that Dr. Larry had taken the bridge of another examinee. To the contrary, the deposition of Dr. John Daniels conclusively showed that his bridge was stolen *before* Dr. Larry ever arrived to the exam site. Furthermore, Dr. Daniels' bridge would not fit in Dr. Larry's patient's mouth. Further, the Affidavits of Drs. Babin and Bolton show that they "believed then and now, that Dr. Larry was either cheating, planning on cheating or thinking about cheating". Allegedly, that is why they were in "hot pursuit"; screaming and yelling; assigning white exam proctors to follow Dr. Larry everywhere he went; interrogating and searching Dr. Larry's dental assistant.

If there had been any greater amount of "hostility", there would have been "bullets flying". Dr. Larry does not know how much racial hostility is enough for the Fifth Circuit - short of death.

This case is the epitome of what happens when courts weigh evidence; create facts; weigh statistics; draw inferences from statistics and editorialize while creating hypothetical situations. The opinion is devoid of caselaw or citations to precedence.

ISSUE 3

MAY THE AFFIRMATIVE DEFENSES OF "RES JUDICATA" AND "CLAIM PRECLUSION" BE RAISED FOR THE FIRST TIME, IN A MOTION FOR PARTIAL SUMMARY JUDGMENT, WHEN THEY WERE NOT RAISED IN THE FIRST INITIAL RESPONSIVE PLEADING? [See, *U.S. v. Burznski Cancer Research Institute*, 819 F.2d 1301 (5th Cir. 1987)].

In accordance with Rule 8(c), Federal Rules of Civil Procedure, in pleading to a preceding pleading, a party *shall* set forth affirmatively, accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. The "*shall*" language is mandatory. A defendant may raise an affirmative defense by a motion for summary judgment *only* when that motion is the initial responsive pleading tendered by the defendant. *Funding Systems Leasing Corp v. Pugh*, 530 F.2d 91 (5th Cir. 1976); *U.S. v. Burznski Cancer Research Institute*, 819 F.2d 1301 (5th Cir. 1987).

In the present case, "res judicata" does not apply, but if it did, "res judicata" is an affirmative defense that should have been raised by the respondents in their initial responsive pleading. That defense has been waived for failure to plead

and prove it. Respondents admitted in their Motion for Partial Summary Judgment, that this defense had been available to them since December 20, 1985. Respondents filed an **Original Answer** and **Amended Answers, Motions for Abstention, Motions to Dismiss** and numerous other pleadings. However, respondents wholly failed to plead their affirmative defenses of "res judicata" and/or "claim preclusion". They waited some (3) three years later to raise "res judicata" in a Motion for Partial Summary Judgment. Petitioners asserted in the district court and at the Fifth Circuit that it was too late to raise "res judicata" because it had been waived. Furthermore, the respondents' Motion for Partial Summary Judgment was not their initial responsive pleading.

Conclusion: On review, this Court should rule that the affirmative defenses of res judicata and claim preclusion have been waived for failure to raise them in the initial responsive pleading.

ISSUE 4

DID PETITIONERS MAKE OUT A PRIMA FACIE CASE OF DISSIMILAR TREATMENT WHICH VIOLATED THE 14TH AMENDMENT EQUAL PROTECTION CLAUSE? [(See, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982); *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981)].

The Equal Protection Clause mandates similar treatment of persons in similar situations, [such as applicants taking an official State dental licensure examination]. *Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982). While the Equal Protection Clause does not require that all persons be treated identically, if distinctions between similarly-

situated individuals are to withstand an equal protection analysis, such distinctions must be reasonable, not arbitrary, and must rest on grounds having a fair and substantial relation to the object of the legislation. *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981). Petitioners presented summary judgment evidence of (29) twenty-nine cases of dissimilar treatment that took place on the June 1984 licensure exam. The district court weighed the evidence and did not believe 29 cases on one exam were enough.

ISSUE 5

SHOULD THE COURT HAVE APPLIED THE "STRICT SCRUTINY" STANDARD OF REVIEW TO PETITIONERS' CLAIMS OF RACE-BASED DISCRIMINATION AND DISSIMILAR TREATMENT RATHER THAN THE "RATIONAL BASIS TEST"? [See, *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984)].

The essence of the equal protection requirement is that the State [of Texas] treat all those similar situated similarly. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979). It is well settled in law that the unequal application of a state law, fair on its face, may act as a denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The equal protection clause mandates similar treatment of persons in similar situations, [such as applicants taking an official State dental licensure examination]. *Arceneaux v. Treen* 671 F.2d 128 (5th Cir. 1982). While the equal protection clause does not require that all persons be treated identically, if distinctions between similarly-situated individuals are to withstand an equal protection analysis, such distinctions must be reasonable, not arbitrary, and must rest on grounds having a fair and substantial relation to the object of the legislation. *Zeigler v. Jackson*, 638 F.2d 776 (5th Cir. 1981).

In the present case, Petitioners have at all times asserted that their constitutional rights to equal protection of the laws had been violated by the respondents, dental examiners. The dental examiners cited numerous cases with which Petitioners agree. For example, "The State has the authority to license doctors, dentists and other medical health professionals". Petitioners totally agree and no challenge was made to the State's authority to license doctors. Respondents stated in their Motion that "the State may constitutionally require graduation from an accredited professional school as a prerequisite to licensure". Petitioners agree and did not challenge the graduation requirement. Petitioners agree that "the State may require high standards and qualifications for licensure".

However, Petitioners and respondents disagree on the proposition that the State may discriminate based on race. It has long been recognized that under the Equal Protection Clause, classifications based on race are "constitutionally suspect" and are subject to the "most rigid scrutiny". G. Gunther, *Individual Rights in Constitutional Law* (1981). The dental examiners have insisted on requiring race, skin complexion, sex and a photograph on dental licensure applications. The dental examiners admit that this information is not kept for any statistical purposes or other governmental purposes. There are less restrictive ways to identify an applicant at the exam site, such as driver's license, diploma and other indicia of identification. "Race" and "skin complexion" on the application serve no useful purpose. Dental licensure applications are submitted to the dental examiners months before the actual examinations. There is no compelling purpose to identify applicants months before the exam, other than to discriminate against Black applicants at the exam.

Conclusion: This Court should rule that strict scrutiny is the standard of review in race-based discrimination cases. The Court should find that the respondents' licensure application, requiring "race" and "skin complexion", is unconstitutional. Racial classifications are subject to exacting scrutiny. *Palmore v. Sidoti*, 104 S.Ct. 1879 (1984).

ISSUE 6

SHOULD THE DISPARATE IMPACT ANALYSIS IN *Watson v. Ft. Worth Bank & Trust*, 108 S.Ct. 2777 (1988) ALSO APPLY TO INSTITUTIONALIZED RACIAL DISCRIMINATION IN PROFESSIONAL LICENSURE, INCLUDING DENTAL LICENSURE?

Petitioners are aware that the *Watson* "disparate impact model" is derived from a Title VII employment discrimination case. All professional licensure, nationwide, is nothing more than a condition of employment. Every person seeking a professional license is usually doing so to become employed.

If the disparate impact analysis is applied to professional licensure, it is possible to increase the number of practicing Black African American healthcare professionals by 50%, nationwide. Petitioners believe this to be an appropriate way to "put the brakes" on subtle, invidious, institutionalized racial discrimination in professional licensure. Until the system of institutionalized racism is dismantled, racial harmony cannot be achieved despite the "bootstrap" theories of upward mobility.

ISSUE 7

DID PETITIONERS PREVAIL ON A SIGNIFICANT ISSUE IN THE LITIGATION, ENTITLING THEM TO AN ATTORNEYS' FEES AWARD UNDER 42 U.S.C. § 1988? [(See, *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989)].

It is well settled that if the Petitioners have succeeded on "any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind". *Texas State Teachers Associations v. Garland Independent School District*, 109 S. Ct. 1486 (1989). As a result of Petitioners' lawsuits, the dental examiners officially discontinued their precedent of allowing white applicants to cement swallowed bridges after the close of the exam. On page 12 of Respondents' Motion For Partial Summary Judgment, the dental examiners admit the following:

> "The unofficial precedent of allowing cementation of swallowed bridges after close of the exam was officially discontinued by order of the Board".

As a result of Petitioners' lawsuits, the dental examiners abolished the "deep-check" rule.

***Interrogatories to respondent*, Dr. William Kemp, Sr., D.D.S. "Please explain the "deep-check rule" and its purpose".**

***ANSWER*: If an applicant is very close to the pulp for exposure of the nerve, then an examiner is called to look at it. If, in the examiner's opinion, he can go ahead and get the decay without an exposure and the**

applicant gets an exposure, then the examiner determines whether he failed or not. ***At this time we have no deep-check rule.***

These Interrogatory Responses were sent to Petitioners on August 13, 1986, some (3) years after Petitioners initially complained about the "deep-check" rule and (1) one year after Dr. Larry filed suit in Federal Court.

Interrogatories to respondent, Dr. Rene Holt, D.D.S. - President - Texas State Board of Dental Examiners.

"Please explain the "deep check rule" and its purpose".

***ANSWER*: There is no such "deep-check rule".**

These Interrogatory Responses were sworn to on July 19, 1986 about (1) year after Petitioners filed suit in Federal Court complaining, in part, about racial discrimination and the "deep-check rule".

As a result of Petitioners lawsuits, the dental examiners removed the "bridge" requirement from the licensure examination. They re-drafted the Examiners' Manual and re-structured the entire dental licensure examination. Petitioners' success has materially altered the dental examiners' unofficial precedents and policies. Petitioners have served the "private attorney general" role which Congress meant to promote in enacting the Civil Rights Attorney's Fees Awards Act of 1976.

CONCLUSION

The judgment of the Courts below should be reversed and rendered.

Respectfully submitted,

JULIUS J. LARRY, III
[Counsel of Record]
River Oaks Tower
3730 Kirby Drive, Suite 1200
Houston, Texas 77098
(713) 831-6823
Attorney for Petitioners
Pro Se

OF COUNSEL:

JUSTICE CENTER - HOUSTON

APPENDIX A

Dr. Julius J. LARRY, III, DDS, and Dr. Abdul-Hakim Ahmed, DDS, Plaintiffs-Appellants,

v.

Mark WHITE, Individually and in His Capacity, et al., Defendants-Appellees.

No. 89-2969.

United States Court of Appeals,
Fifth Circuit.

April 24, 1991.

Black unsuccessful examinees for Texas dental license filed civil rights suit. The United States District Court for the Southern District of Texas at Houston, Lynn N. Hughes, J., granted summary judgment of dismissal. On appeal, the Court of Appeals, Garwood, Circuit Judge, held that: (1) statistical evidence that graduates of out-of-state dental schools that were "predominantly" black did not fare as well on examination as did graduates of in-state dental schools that were "predominantly" white did not demonstrate discriminatory effect or purpose; (2) showing that the only examinee of those who requested and received a "deep check" who failed was the sole black among the group did not make out prima facie case of intentional race discrimination; (3) licensing of two white examinees who did not finish examination was not evidence of racial discrimination; and (4) request for Rule 11 sanctions based on inclusion of qualified immunity defense in summary judgment motion was properly denied.

Affirmed.

1. Civil Rights -- 242(1)

Statistics presented by black unsuccessful examinee *for Texas dental license, showing that graduates of two out-*of-state dental schools that were assertedly "predominantly" black historically did not fare as well on Texas dental licensing examination as did graduates of in-state dental schools that were assertedly "predominately" white did not demonstrate discriminatory effect or purpose of challenged acts, and might reasonably lead to inferences other than racial animus by Texas Board of Dentistry; out-of-state students generally had much higher failure rate than in-state students, there was no showing that in any way correlated higher out-of-state failure rate to rate. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. §§ 1981, 1983, 1985.

2. Federal Civil Procedure -- 2554

Letter that was not presented to district court in affidavit or other verified form could not be considered in ruling on summary judgment motion. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

3. Civil Rights -- 242(1)

Black unsuccessful examinee for Texas dental license did not make out prima facie case of intentional racial discrimination through mere showing that of examinees who had "deep check" on examination the only one to fail was the sole black among the group. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. §§ 1981, 1983, 1985.

4. Civil Rights -- 242(1)

Evidence that one white examinee was accidentally awarded a Texas dental license even though he had not finished examination and that another white examinee was permitted to complete examination a few days following end of examination period at which his patient swallowed bridge was insufficient evidence of racial discrimination, for purposes of suit by unsuccessful black examinee. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. §§ 1981, 1983, 1985.

5. Federal Civil Procedure -- 2774(5)

Request for Rule 11 sanctions in civil rights action based on defendants' inclusion of qualified immunity defense in summary judgment motion was properly denied, absent evidence that judge to whom case had previously been assigned had issued ruling on issue adverse to defendants. Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A.

Julius J. Larry, III, Houston, Tex., pro se.

Carnegie H. Mims, Jr., Jefferson & Mims, Houston, Tex., for Dr. Abdul-Hakim Ahmed.

Abdul-Hakim Ahmed, DDS, J.D., Houston, Tex., for amicus-Gulf State Dental Asso. of Texas, Inc.

Joseph W. Barbisch, Austin, Tex., Elena DiIorio, Vinson & Elkins, Houston, Tex., for Mark White.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GARWOOD and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellants Dr. Julius J. Larry, III (Dr. Larry) and Dr. Abdul-Hakim Ahmed (Dr. Ahmed) appeal the district court's summary judgment dismissal of their suit against defendants-appellees Mark White, et al (appellees). We affirm.

Facts and Proceeding Below

Dr. Larry, black and a graduate of Meharry School of Dentistry in Nashville, Tennessee, who practiced dentistry in the United States Army for six years, completed and failed the Texas dental licensing examination twice, once in August 1983 and again in June 1984. The examination consists of three parts that are taken over the course of three and one-half days: a section on dentistry and the law, a denture set-up section, and an oral diagnosis and treatment plan section. During the last section of the August 1983 examination, five members of the Texas State Board of Dental Examiners (Board) failed Dr. Larry while he was preparing a filling, purportedly because he was about to lay a base over decay that he had failed to remove from his patient's tooth.[1] Larry contends that he had requested a "deep check" from the

[1] It appears that five dental board members must agree to fail someone on this section of the examination. However, that number is not needed to fail someone for not meeting an examination time deadline. It is not clear from the record whether more than one Board member must vote to fail someone for not meeting a deadline.

examiners, but was not given one.[2] Appellees deny that Dr. Larry failed because he had not obtained a "deep check" prior to a pulpal exposure and maintain that he failed only because of his error in preparing to lay a base over decay as reflected in the Board records.[3]

Dr. Larry repeated the dental licensing examination in June 1984 and again failed. He asserts that at 8:40 a.m. on the morning of the final part of the examination, examiners requested to see the completed bridge he was to have prepared. Dr. Larry maintains that because the examination was not supposed to end until noon, he had nothing to show the examiners. He asserts that as a result, Board members and appellees, Brian Babin (Babin) and L. Jack Bolton (Bolton), harassed him for twenty to thirty minutes by shouting at him. Dr. Larry claims that the reason given for his failure was that he did not have his bridge ready for the 10:00 a.m. pre-cementation check. Appellees maintain that dr. Larry failed this portion of the

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[2] The "deep check" is a procedure, unwritten in the examination manual but orally explained to examinees prior to the examination, that permits examinees to avoid what could otherwise constitute grounds for failure when the nerve or pulpal cavity may be exposed in the course of the examination. To invoke the procedure, the examinee requests that the examiner take note of the possibility of such exposure, thus permitting the examinee to continue the examination if exposure subsequently occurs. Deposition testimony reflected that the "deep check" will not prevent failure if the subsequent exposure was "careless" or "wasn't necessary." Appellants stated below that they "do not quarrel with defendants' testimony in this regard."

[3] Dr. Larry asserts in this regard that the appellees also failed him for leaving, in addition to the decay, "loose enamel rods" on the tooth over which he was about to lay a base. Dr. Larry maintains that such rods cannot be seen with the naked eye, the insinuation being that it is not the true reason for his failure.

examination because he did not complete his dental bridge by the termination of the examination at noon.[4]

Dr. Ahmed, also black, is a graduate of the University of Texas Dental Branch at Houston who first completed the dental licensing examination in June 1984. He claims that he requested and received a "deep check" in the final part of the examination when he feared nerve exposure, but that five examiners concurred in failing him when nerve exposure subsequently occurred. According to Dr. Ahmed, the examiners asserted that Dr. Ahmed had failed because he had "proceeded on unnecessarily and mechanically exposed the tooth." Appellees maintain in their brief that Dr. Ahmed failed because he had "cut through good tooth in creating the exposure." Dr. Ahmed voluntarily withdrew from the final part of the September 1984 examination when his bridge would not properly fit the patient's mouth at the 10:00 a.m. pre-cementation check, even though, according to Dr. Ahmed, it had previously fit properly. Dr. Ahmed subsequently argued before the Board in a December 1984 hearing granted at his request that the misfit occurred because the patient suffered from a rare gum disease, Crohn's Disease, which caused two teeth to shift.[5] He claimed that just two days after the end of the examination the bridge in question was seated in the same patient's mouth by a licensed dentist. The Board unanimously rejected Dr. Ahmed's contention because it claimed it should not make an exception to its rules and pass Dr. Ahmed even though, according to Dr. Ahmed, the Board had in the past

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[4] Dr. Larry also asserted in his complaint that the examiners had accused him of stealing another examinee's gold bridge and that Bolton and Babin followed him everywhere that morning "in hot pursuit."

[5] Dr. Ahmed said he knew before the examination that the patient had Crohn's disease, but apparently did not believe it could cause this problem.

made exceptions for white examinees. Dr. Ahmed was offered, but refused, the opportunity to take the next examination.[6]

Dr. Larry filed a complaint in Texas state court on June 20, 1984, against Babin, Bolton, and the Texas State Board of Dentistry, contending that defendants denied him his equal protection and due process rights under the Fourteenth Amendment of the United States Constitution. Dr. Larry amended the complaint three times, adding defendants and additionally alleging slander and intentional infliction of emotional distress. The state court dismissed the suit in December 1985 for want of jurisdiction on sovereign immunity grounds. Dr. Larry subsequently withdrew his notice of appeal.

On April 2, 1985, Dr. Larry filed the present suit against eighteen people, including then-Texas Governor Mark White, and various members of the Board as well as two of its attorneys, all in their individual and official capacities. The complaint sought relief under 42 U.S.C. §§ 1981, 1983 and 1985, alleging that defendants had engaged in "racially biased and discriminatory practices, under color of state law." Dr. Ahmed filed his suit on April 3, 1986, against virtually the same defendants as those named in Dr. Larry's complaint with the addition of the Texas State Board of Dentistry and the University of Texas Dental Branch at Houston. He sought relief as well under 42 U.S.C. §§ 1981, 1983, and 1985, alleging that defendants conspired against him based on his race, color, religion, and skin complexion, thus depriving him of his civil rights under color of state law. The cases were consolidated on November 20, 1986. The district court granted appellees' summary judgment

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[6] As of the summary judgment hearing, Drs. Larry and Ahmed each remained, and had remained, eligible to retake the licensing examination.

motion on August 1, 1989, stating that Dr. Larry and Dr. Ahmed had failed to demonstrate that the Board had acted with a racially prejudicial animus. Dr. Larry and Dr. Ahmed each filed timely notice of appeal.

Discussion

Appellants contend on appeal that the district court erred in granting appellees' summary judgment motion, asserting that a genuine issue of material fact exists regarding whether appellees failed them on their respective dental licensing examinations because of their race.[7] To demonstrate that a challenged official act violates the racial component of the equal protection clause of the Fourteenth Amendment, a party must prove the racially discriminatory purpose of the act. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2047-50, 48 L.Ed.2d 597 (1976). The district court dismissed the case because appellants did not show that the challenged conduct was based on a "racial animus."[8]

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[7] Appellants' only claim here is one of racial discrimination. Appellants have made no substantive or procedural due process arguments. Their consolidated action is not a class action.

We note in passing that appellees' motion for summary judgment below was styled a "motion for partial summary judgment," apparently because it did not seek dismissal of Dr. Ahmed's "pendent state claims" (it *did* seek dismissal of all of Dr. Larry's claims; and its prayer requested that the court "dismiss plaintiffs' claims with prejudice"). On appeal Dr. Ahmed does not predicate any claim of error on the "partial" nature of the motion, and his only complaint (apart from the denial of Rule 11 sanctions) relates to the district court's ruling on his claim of racial discrimination, a matter that was clearly addressed in the summary judgment motion.

[8] Dr. Larry asserts that "it is not necessary to prove discriminatory intent in a disparate impact" case, citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

As indicating racial discrimination, Dr. Larry presents statistics showing that graduates of two assertedly "predominately" black dental schools, Howard and Meharry, historically do not fare as well on the Texas dental licensing examination as do graduates of Baylor University and the University of Texas dental schools, which are assertedly "predominantly" white.[9] Dr. Ahmed presented, following the summary judgment hearing, an unsworn letter from a statistician he retained stating that, based entirely on the assumed fact that of the twenty-four examinees who received a "deep check" at the June 1984 examination, the sole one to fail that examination was the only black among the twenty-four, racial discrimination probably existed in application of the deep check rule at that examination.

[1-3] Dr. Larry's skimpy and partial statistics do not further his claim of racial discrimination because they might reasonably lead to inferences other than racial animus by the Board. Because Meharry and Howard are located outside of Texas and the University of Texas and Baylor are in Texas, one could conclude from Dr. Larry's data that out-of-state students have fared less well historically on the Texas dental licensing examination than have in-state students. Indeed, the summary judgment evidence showed that out-of-state students generally had a much higher failure rate than in-state students. There was no showing that in any

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However the disparate impact theory and the *Watson* decision pertain to Title VII cases and are therefore inapposite here. *See Davis*, 96 S.Ct. at 2051-52.

[9] Dr. Larry asserts on brief that the 1983 and 1984 passing percentages were as follows: University of Texas (90%, 87%), Baylor (91%, 86%), Meharry (25%, 20%), Howard (15%, 42%). The numbers and races of the examinees are not reflected in this presentation. Nor is the actual racial comparison of any of these dental schools shown in the record.

way correlated the higher out-of-state failure rate to race. Further, one might infer from Dr. Larry's statistics that the reason for the disparity in examination results is that Meharry and Howard are less academically rigorous than Baylor and the University of Texas.[10] The statistics do not separately reflect the pass rates on the dental licensing examination for black and white students at these schools (nor even the actual racial composition of the respective dental school student bodies or of their examinees). However, the undisputed evidence does show that all in-state blacks who took the examinations with Dr. Larry and Dr. Ahmed passed either those or subsequent examinations and were licensed to practice in Texas. The evidence also shows that a greater number of students failed the examinations taken by Dr. Larry and Dr. Ahmed than is normally the case. Statistics presented by appellees below in support of their motion for summary judgment reflect that in the nine examinations given from May 1983-85, at which there were over 1,100 examinees in all, the failure rate ranged from six to nine percent for six of the examinations; but for the August 1983, June 1984, and September 1984 examinations, the failure rate was 43, 21, and 23 percent, respectively. We conclude that Dr. Larry's statistics do not demonstrate either a discriminatory effect or a discriminatory purpose of the challenged acts.[11] The letter from Dr. Ahmed's statistician was not presented to the district court in affidavit or other verified form, and appellants are not entitled to have it considered in ruling on the summary judgment motion.

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[10] There was no summary judgment evidence respecting the quality or rigor of the programs at any of the four named institutions, or how their graduates fared on licensing examinations in other states, or the like.

[11] We observe that, as Dr. Larry conceded at oral argument, much of the statistical data in his brief was actually not before the district court. Dr. Larry's brief does not indicate where in the record his statistical information may be found.

See FED. R. CIV. P. 56(c). Moreover, we are unwilling to hold that a *prima facie* case of intentional racial discrimination is made out by no more of a showing than that of the twenty-four examinees who had a "deep check" on the June 1984 examination the only one to fail was the sole black among the twenty-four, particularly as the letter gives no indication of consideration of any other variables or of the particular facts involved, or of anything other than the mentioned numbers, or any explanation of why such consideration would not be necessary to a meaningful conclusion.

[4] Appellants also note the cases of two white examinees who passed the June 1984 examination as evidence of racial discrimination. One examinee received a dental license even though he had not finished the examination. When the Board learned of its error, it procured surrender of the license. The other examinee was permitted to complete the examination a few days following the end of the examination period at which his patient swallowed a bridge. Although one might question the judgment of the Board in these instances, nothing Dr. Larry and Dr. Ahmed point to indicates that the Board's actions were at all racially motivated. *Cf. Richardson v. McFadden*, 563 F.2d 1130 (4th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978)(mistakes of bar examiners in individual cases do not necessarily amount to denial of equal protection).

Dr. Ahmed also asserts that six white examinees who experienced pulpal exposure without first getting a "deep check" passed. Dr. Ahmed avers that Dr. Paulette Arana (Arana) had told him that she and other white examinees passed the examination even though they had experienced pulpal exposure and had not received "deep checks." However, in Dr. Ahmed's affidavit relating a phone conversation he had had with Dr. Arana, Dr. Ahmed asserts

that she stated she had received a "deep check." Three of the six white examinees mentioned by Dr. Ahmed, including Dr. Arana, averred in affidavits filed below that they had in fact received deep checks. We have found no contrary summary judgment evidence. Dr. Ahmed has not demonstrated by any competent summary judgment evidence any racial motivation on the part of appellees with regard to their "deep check" policy.[12]

Neither Dr. Larry nor Dr. Ahmed presented the district court with direct evidence of racial discrimination. Their experiences during the examinations do not demonstrate racially discriminatory intent on the part of appellees. The record indicates that Dr. Larry failed in August 1983 because he was about to lay a base over decay and loose enamel rods he had left on a tooth. His reference to the "deep check" procedure seems inapposite since that

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[12] Dr. Ahmed asserts in his brief that appellees have stated that they do not believe African-Americans are entitled to a deep check. He cites us to no summary judgment evidence of this, however, and we have found none. Dr. Ahmed also states that none of the four white examinees who received a deep check but experienced pulpal exposure failed. Again, he does not direct us to any supporting summary judgment evidence in the record, and we have found none.

Further, the summary judgment evidence reflects that pulpal exposure in the absence of a prior deep check was not intended to be an invariable or automatic cause of failure, and that failure on this basis would not be appropriate where, due to unusual circumstances, the exposure could not have reasonably been foreseen. Dr. Ahmed claims that a purported rule or practice of "automatic" failure was stated by certain Board members in their depositions, and was announced by one Board member at an examination. We are not cited to any place in the record where such depositions appear, nor to any summary judgment evidence of the announcement, and we have found none of either in the record. Unsworn pleadings, memoranda, or the like are not, of course, competent summary judgment evidence. Depositions that are not included in the record (or were not filed below) are not to be considered.

procedure relates only to cases of nerve or pulpal exposure. Further, whether Dr. Larry failed the examination in his second attempt because he missed the precementation check[13], as he suggests, or the noon deadline, as appellees contend, there is no evidence that the Board's decision to fail him was racially motivated. Taking his claim of harassment as true, Dr. Larry has not shown that the harassment was racially motivated or alleged that Babin or Bolton displayed any racial hostility toward him.[14]

Dr. Ahmed failed the June 1984 examination, after, according to him, having received a "deep check," when he cut through good tooth and exposed a nerve. However, because the "deep check" procedure does not ensure a passing grade if the exposure was unnecessary, which the Board members concluded was the case here, the Board's action is not shown to have been racially motivated. Dr. Ahmed withdrew voluntarily from the September 1984 examination, and he has not presented any evidence suggesting that the Board was under an obligation to later pass him on that never completed examination even if he felt he had a good reason for withdrawing.[15] He declined to

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[13] Even if this rule is not written, as appellants assert, it is undisputed that the examinees were all orally informed of its existence before the examination.

[14] The evidence indicates that Babin and Bolton thought Dr. Larry had taken the bridge of another examinee, whose bridge the undisputed evidence showed had mysteriously disappeared.

[15] Dr. Ahmed, in his December 1984 hearing before the Board, requested that he be passed on the September 1984 examination, notwithstanding that he withdrew from it voluntarily when he was unable to fit the bridge, because two days after the examination ended a Houston dentist had fitted the bridge. Dr. Ahmed said the patient had had Crohn's disease, which he said he knew at the time but was unaware that it could affect the mouth. The bridge was made from an impression Dr. Ahmed

take any subsequent examination.

[5] Dr. Ahmed's final argument on appeal is that the district court abused its discretion by not granting appellants Rule 11 sanctions. Appellants had sought such sanctions for appellees' conduct in including *res judicata* and qualified immunity defenses in their motion for summary judgment. Dr. Ahmed contends that appellees had previously received adverse rulings on such defenses from the judges who handled the cases prior to their being consolidated before Judge Hughes, and that appellees therefore should not have been reurging the defenses. Dr. Ahmed asserts that Judge Hughes denied the Rule 11 motion because of the age of the case without making any findings or conclusions.

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had previously made of the patient as part of the examination. Dr. Ahmed advised the Board of the following "hypothesis" of why he had been unable to fit the bridge, namely because Crohn's disease had caused "an unexpected shift of the second and third molars." Dr. Ahmed stated:

> "Based on the information I received from these personal conversations [with certain dentists or doctors] and information gleaned from the literature reviewed, the following hypothesis is put forth: an unexpected shift of both the second and third molars of the lower right quadrant as a result of an acute inflammatory reaction caused by the dental surgical procedure and the retraction cord with its associated chemical agent."

Nothing appears in the record or was submitted from any of the dentists or doctors whom Dr. Ahmed said reviewed his "hypothesis" and found it reasonable. The dentist who had later seated the bridge submitted a letter stating that he had done so, but not commenting on the "hypothesis," any present or past "shifting" (or movement) of teeth, or Crohn's disease. The medical literature Dr. Ahmed submitted does make general references to the fact that Crohn's disease may adversely affect the mouth or cause "oral lesions"; nothing in it refers to any "unexpected shift" of the position of teeth or anything of that kind. Even Dr. Ahmed did not present his theory of what happened as anything more than a reconstructed "hypothesis" of what *may* have happened.

The *res judicata* defense was asserted below only as to Dr. Larry since he alone brought the relevant state suit, and Dr. Larry has not raised the Rule 11 issue in his brief on appeal.[16] Therefore, we consider Dr. Ahmed's Rule 11 argument only with respect to the qualified immunity assertion. In an August 27, 1986 pretrial order, the district court ruled that discovery on the qualified immunity issue should continue "until the immunity issue is resolved." The discovery period formally ended on December 31, 1987, and appellees filed their motion for summary judgment, which included the qualified immunity defense, on March 14, 1988. Nothing Dr. Ahmed has presented this Court indicates that the district court had in any way ruled on the defense until after this filing. The district court did not abuse its discretion in denying the request for the Rule 11 sanctions.

Conclusion

For the foregoing reasons, the district court's judgment is

AFFIRMED.

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[16] We observe that Dr. Larry's federal court suit might arguably have been precluded by the earlier state court judgment at least with regard to those parties who were defendants in both suits. We express no view as to federal suit defendants who were not also named in Dr. Larry's state court suit, although we note that complete identity of parties in the two suits is not always required. *See Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989). Because Dr. Larry's federal claim arises out of the same operative facts as the state court suit and could have been litigated in the state court suit, the doctrine of *res judicata* might arguably apply. *See Flores v. Edinburg Consolidated Independent School District*, 741 F.2d 773 (5th Cir. 1984). Although appellees did not raise the *res judicata* defense in their first pleading following the decision of the state court, we note that a court may, if it chooses, raise *res judicata sua sponte*. *See American Furniture Co. v. Int'l Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. 1981). Thus, in any event, it is difficult to see how a Rule 11 violation could be made out with respect to the assertion of *res judicata*.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 1 1989
JESSE E. CLARK, CLERK
BY DEPUTY:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JULIUS J. LARRY, III, et al.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION
	§	NO. H-85-1582
RANDOLPH MINATRA, et al.,	§	
Defendants.	§	

OPINION ON SUMMARY JUDGMENT

After years of motions and conferences attempting to focus on the facts of the complaint, the state offered evidence to show the rational procedure and basis for failing examinees who took the Texas Dental Examination. Ahmed and Larry have not rebutted the offered explanations for failures with statistical or other evidence showing racial prejudice.

Ahmed and Larry have submitted no evidence illustrating a prejudicial animus of the Board's examiners. The Board's procedure of scoring examinees by relying on the examiners' ability to observe and judge the examinees' dental proficiency is consistent with the objective of the examination. The procedure that a consensus of five

examiners find an examinee has performed unsatisfactorily, resulting in the failure of the examinee, precludes a determination of the Board being arbitrary and in fact illustrates a legitimate basis for failure that is unrelated to race unless, of course, there were after four years some evidence of higher level policy of discrimination or personal animus between the plaintiffs and all five examiners.

The statistics presented by Ahmed and Larry merely indicate that twenty-four examinees during one examination requested a "deep check" and that of those examinees the one who failed was black. These statistics show a four percent failure rate of examinees requesting a "deep check." No causation has been shown between the failure of the black examinee and a racial animus rather than unsatisfactory dentistry of the examinee.

A judgment for the defendants will be entered.

Signed on July 28, 1989, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
AUG 1 1989
JESSE E. CLARK, CLERK
BY DEPUTY:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JULIUS J. LARRY, III, et al., Plaintiffs,	§	
vs.	§	CIVIL ACTION
	§	NO. H-85-1582
RANDOLPH MINATRA, et al., Defendants.	§	

FINAL JUDGMENT

The plaintiffs take nothing by this cause of action.

Signed on July 28, 1989, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C

U.S. COURT OF APPEALS
FILED
NOV 18 1992
RICHARD E. WINDHORST, JR.
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2969

DR. JULIUS J. LARRY, III, DDS, and
DR. ABDUL-HAKIM AHMED, DDS,
Plaintiffs-Appellants,

versus

MARK WHITE, Individually and in His Capacity, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas

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ON SUGGESTIONS FOR REHEARING EN BANC
(Opinion April 24, 5 Cir., 1991, ___F.2d___)
(November 18, 1992)

Before GARWOOD and DAVIS, Circuit Judges.*

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Wilt Garwood
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.
REHG-9

* Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992 and, therefore did not participate in this decision. This matter is being decided by a quorum. 28 U.S.C. 46(d).

APPENDIX D
APPLICATION FOR EXAMINATION TO PRACTICE DENTISTRY

All Numbered Questions or Statments Must Be Answered: Incomplete Applications Will Be Returned

APPLICANT MUST PAST BUST PHOTOGRAPH THIS SIZE (No hats please)

THE TEXAS STATE BOARD OF DENTAL EXAMINERS
P.O. BOX 13165, CAPITAL STATION
AUSTIN, TEXAS 78711
512/475-2443

APPLICATION FOR EXAMINATION TO PRACTICIE DENTISTRY

FAILED

(1) Julius James Larry, iii
first Name Middle Name Last or Married Name

16 Charleston Park Dr. #2217
Present address (Street , City) State , Zip Code

(713) 664-3677 258-76-7803
(AC) Home Phone (AC)Office /Business Phone Social Security No

Same as above
Permanent Address Where I May Always Be Reached

FAILED

Full Name of Husband or Wife(is married) Judy Elaine

none
Husband/Wife's Business Address (AC)Business Phone

(2) 24 Nov. 49 34 San Antonio, Tx
Date of Birth Present Age Place of Birth

(3)Meharry Med. Coll. 28 May 78
School Granting Dental Degree Date

(4) I am licensed to practice Denistry in the following jurisdictions and no other:

FAILED

Jurisdiction	How Licensed	License Number	Date	Years of Practice
none				
U.S. Army				3

(5) I have been refused Dental examination in the following jurisdictions, and no others for the following reasons:
(give dates) none

(6) I have failed the Dental examination of the following jurisdictions and no others;(give dates)
Texas 8/83

(7) I belong to the following professional societies and organizations: American Dental Assoc. ,Nat'l Dental Assoc:., ABA- Law Stud. Div.

(8) I have never been charged with or convicted of a crime of the grade of felony except:
none

(9) I have never been charged with, convicted of, or been a party to or been disciplined for a violation of the dental laws of this or any other jurisdiction or professional association except as follows:
none

OFFICE RECORD

Rec'd 5-8-84

Receipt No. 69768

Exam Date

June 14-17 '84

I have taken the National Board examination.

Yes X No

I have taken the required CPR course within the last 12 months

Yes or No YES

If yes. attach supporting doc-

LEFT HANDED
Yes☐ No ☒

T.S.B.D.E.
RECEIVED
MAY 8 '81

(10) My height is 5"10" Weight 210 lbs. Complexion Dk.Brn Race Blk Sex Male
Color of Hair Blk&Gray Color of Eyes Brn I am(check one)Married____ Single_____
(11)_____Deceased_____Angel M. Larry_____.

Father's Name Mother's Name
ADDRESS_____ ADDRESS 2414 Harden St.
_____ Savannah, Ga.
OCCUPATION_____ OCCUPATION Retired
Has your surname ever been changed? no If so, when and from what?_____

T.S.B.D.E.
RECEIVED
APR 19 '81

APPENDIX E

10-Year Study -- Board's Passage Rates-%

	1975	1976	1977	1978	1979
UT	93	96	88	97	100 %
Baylor	79	92	94	84	88 %
Meharry	16	66	50	0	12 %
Howard	*100	0	0	71	0 %

	1980	1981	1982	1983	1984
UT	95	93	94	90	87 %
Baylor	98	92	83	91	86 %
Meharry	25	50	50	25	20 %

* one applicant took the examination and one applicant passed

RELEVANT STATISTICS
Ron Mallet, DDS
March 9, 1990

* Texas is 12% Black of which 87% live in Houston Dallas/Fort Worth.

* There are 193 Black licensed dentists in the state of Texas. Black dentists comprise 2.28% of all dentists licensed in Texas.

* 84% of licensed dentists (non-Black) graduated from a Texas institution. Only 38.9% of Black dentists graduated from a Texas school.

ACTIVE & DELINQUENT DENTISTS RESIDING IN TEXAS - 8454

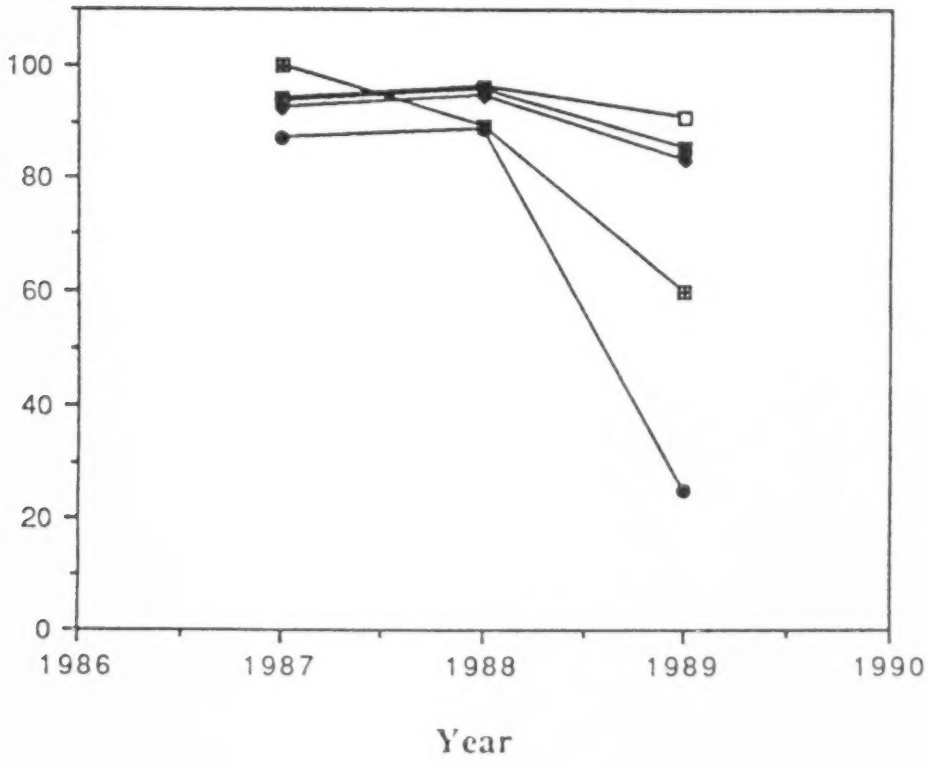
BREAKDOWN BY RACE

White	7940
Black	193
Hispanic	194
Asian	112
Amer. Indian	2
Other	13
	8454

BREAKDOWN ON GRADUATES FROM TEXAS SCHOOLS

BAYLOR		UT HOUSTON		U T S A N ANTONIO	
White	2718	White	3009	White	1040
Black	11	Black	57	Black	7
Hispanic	17	Hispanic	98	Hispanic	63
Asian	15	Asian	52	Asian	22
Amer.Indian	1	Amer.Indain	0	Amer.Indain	1
Other	3	Other	6	Other	0
	2765		3222		1133

Percent Passing State Licensure Exam



ADDITIONAL STATISTICS

* Percent of Blacks' passing the State Licensure Exam

	In-State	**Out-of-State**
1987	100%	66%
1988	100%	66%
1989	50%	0%

* Of the licensed Black dentists who graduated from a Texas institution, the breakdown by location is as follows:

City	*Number*	*Percent*
Houston	57	29.5%
Baylor	11	5.7%
San Antonio	7	3.6%

APPENDIX F

The University of Texas
Health Science Center at San Antonio
7703 Floyd Curl Drive
San Antonio, Texas 78284-7914

Dental School (512)567-3450
Department of General Practice December 6, 1990

The Honorable Fred Blair
House of Representatives
State Capitol
Post Office Box 2910
Austin, Texas 78768-2910

Dear Mr. Blair:

Enclosed is a copy of the report I made at the public hearing before the Texas Council on Minority Health Affairs which you conducted in San Antonio on November 16, 1990. I wish to thank you and your council members for the opportunity to be a part of your agenda.

One of the issues raised during the discussion that followed this presentation pertained to the success of Black dentists career wise. At present I have not been able to determine any differences in the career status of Black dentists relative to all dentists.

The changes and developments that occurred in the economy and practice management in the 80's have greatly impacted greatly on the number of dentists who choose to set up solo private practices today. Certainly changes in bank lending practices were a part of this scenario. I will continue to research this issue and will keep you informed.

The recruitment of more Black students into the dental profession will depend on not only the institutional responsibility of dental schools but also a statewide network to plan and implement programs to insure an educationally prepared and informed Black community. The success of Black recruitment in dentistry and other scientifically based professions will depend on this type of external support.

Because of your efforts I look forward to the New Year and the new legislative year with great enthusiasm.

Sincerely,

/s/ Hazel P. Haynes
Hazel P. Haynes, D.M.D.
Assistant Professor

HPH/ds

cc:Kenneth Kalkwarf, D.D.S, M.S.	Dean University of Texas Health Science Center Dental School at San Antonio
Elaine Neenan, D.D.S, M.S.	Assistant Dean for Extramural Affairs University of Texas Health Science Center Dental School at San Antonio

TESTIMONY TO THE TEXAS COUNCIL ON MINORITY HEALTH AFFAIRS *PUBLIC HEARING*

By

Dr. Hazel P. Haynes, Coordinator of Student Recruitment and Retention, University of Texas Health Science Center Dental School at San Antonio
Assistant Professor, Department of General Practice

My name is Dr. Hazel P. Haynes. I am a full-time faculty at the University of Texas Health Science Center Dental School at San Antonio (UTHSCDSSA). I am here today on behalf of the Dental School and the Gulf State Dental Association of Texas to address the provider supply of Black dentists in the state of Texas as a barrier to oral health care among Black Texans.

A major problem in the nation's current health care crisis is how to resolve the growing need to care for the underserved. Often masked within this problem is the need to provide adequate dental care. During this hearing you have heard detailed statistics and analyses of the oral health status of Hispanics along the Texas-Mexico Border, including disease patterns, population needs and health care provider assessments.

During considerable discussions with my colleagues, I find a similar focus absent amongst the poor rural and urban Black community of Texas. The Texas Department of Health's study of caries prevalence in adolescents from 1984 to 1988 revealed that Blacks and Hispanics not only have significantly more decay but also less treatment of it. The data also indicates significant differences in the level of care

between public health regions. A relatively low treatment rate is seen especially in Region 7, where a approximately 10% of all Black Texans reside.

The census data of 1980 provided evidence that Black, Hispanic and American Indian dentists are more likely to locate in counties with greater than 20% poverty level, but in lesser proportions to their population group. In addition, Black dentists tend to serve in areas of need more so than the Black physician. However, unless the numbers of Black dentists increase significantly in Texas and nationwide, this trend will have little or no impact on the oral health of the growing populations of the underserved. While the actual numbers of total US Black dentists may show some small increases from year to year, the overall percentage of Black dentists relative to the total number of practicing dentists is slowly declining in recent years.

As I stated before, my comments will address the imbalance in the dental health status of Black Texans from the perspective of the need for more Black dentists.

Recent information (Spring, 1990) obtained from the Texas State Board of Dental Examiners indicate that there have been 194 licensed Black dentists in the state of Texas since the days of record keeping began in 1900. This figure comprises 2.8% of the total licensed dentists of nearly 8500. Though the Black population in the state is 12% of the total Texas population, it is estimated that only 100 (one hundred) Black dentists are currently practicing dentistry in the state compared to approximately 5400 non-Black dentists.

A recent survey of the licensed Black dentists in Texas indicated that only 40% of them graduated from Texas dental schools compared to 84% for non-Black Texas dentists. Statistics received from the Texas State Board in early 1990

regarding the licensed Black graduates from the three Texas schools showed eleven (11) from Baylor University Dental School, fifty-seven (57) from the University of Texas at Houston Dental Branch and eight (8) from the UTHSCDSSA.

As fewer Blacks enroll in the Texas dental schools, these statistics continue to resemble the days when a dual educational system existed in Texas dental education, wherein Black Texans were forced to go out-of-state to seek a dental education.

In 1988-89, the Black dental applicant pool to the University of Texas System was 4%, representing 18 persons out of a total 450 applicants. At present a total of 16 Blacks have applied to the University of Texas System dental schools for the 1990-91 academic year.

Present analyses indicate that while the applicant pool for other minorities is either increasing or stable, it is declining for Black applicants. These statistics and our considerable experience with minority recruitment in general indicate that different approaches must be realized to recruit Black students if we are to offset this decade long trend.

For the above reasons, Gulf State Dental Association (GSDA), the association of Black dentists in the state of Texas, in conjunction with the three dental schools in the state, is re-assessing past recruitment strategies, and seek to provide information to the Black segment of the population, about the educational opportunities available in the three Texas dental schools.

In 1986, the UTHSCDSSA Dental Administration appointed a Task Force on Black Recruitment and Retention and sought the advice of academic and lay leaders who made major

recommendations. Many factors, too numerous to name at this time, effect the shortage of Black dental applicants. Of the recommendations made, the following are key implementation areas at the UTHSCDSSA.

1) Implement an aggressive image-shaping campaign to correct negative perceptions that exist within the Black community regarding access to dental education for Blacks in the state of Texas. The first Black to graduate from a Texas dental school did so in 1955. Prior to that time blacks were financially supported to attend out of state dental schools rather than be admitted to the two Texas dental schools which existed at the time.

2) Increase the quality and quantity of the Black applicant pool in Texas.

3) Increase the enrollment of Black dental students at the UTHSCDSSA.

4) Enhance the retention and graduation rates of Black dentists at the UTHSCDSSA.

5) Identify ways to reduce the cost of dental education, including scholarships and alternative curricula.

According to a 1990 UTHSCDSSA student survey (and corroborated by several national studies), at least fifty percent (50%) of our dental students first considered dentistry as a career before graduating from high school. Sixty percent (60%) of our students made their final decision

to pursue dentistry in college - generally between their freshman and juniors years. Twenty percent (20%) decided prior to college.

In the state of Texas, a total of 14.7% or 488,066 Black students were enrolled at the high school and/or below level in 1989-90. The Black college enrollment for all Texas public universities totaled 33,287 students or 8.3%, matriculating at 34 (thirty-four) institutions for the same period.

Therefore a shortage of Blacks in higher education in the state of Texas automatically limits access to the dental profession as well as other scientifically based professions.

According to the American Council on Higher Education, Black college enrollment peaked in 1976 at 33.5% (Anglo was 33%). In 1985, it fell to 26.1% (Anglo increased slightly to 34.4%). This drop in Black college students occurred despite the fact that during the same period, the proportion of Black high school graduates rose from 67% to 75.6%

Therefore the Texas data is commensurate with the national trend. This is not surprising, considering that the Black population in Texas represents 12% of the nations's Black population. This severe constriction of upward mobility beyond high school requires an attempt at mitigation when competing for college level predental students. Your interes, support and assistance is needed.

In summary, there is a need to redress the method used to disseminate information about dentistry as a career choice to young Black Texans (as well as second career persons) for the following reasons:

1) Current recruiting efforts which are effective for others seem to have little or no impact on the Texas Black dental applicant pool from year to year.

2) Black high school graduation rates are better than ever except for certain major cities where the drop-out rate approach 45-50%.

3) Black families/students transcend all economic, residential and institutional barriers resulting in a demographic diversity that may preclude the visibility of role models and therefore, consideration of dentistry as a career.

4) There are three dental shcools available in the state of Texas, two public and one private, with student support systems in place.

Therefore I would like to leave you with the following three recommendations:

1) That the legislature provide leadership and support for a highly visible planning agency that will network with schools, colleges, health care agencies and facilities and other appropriate organizations to analyze and address more comprehensively the dental and overall health needs of Black Texans and thereby make appropriate and updated analysis of the effect of Black manpower availability on the oral health status of Black Texans.

2) That the legislature provide support and leadership for program development that will

implement health science recruitment programs in East Texas and expanded recruitment activities of same in the major cities in Texas (Austin, Dallas, Houston, and San Antonio) at both the high school and college level. Nearly 100% of Black Texans reside in the eastern helf of Texas - thirteen percent (13%) in East Texas small towns and cities, eighty percent (80%) in Dallas and Houston and the remaining 7% in other major cities such as San Antonio and Austin.

3) That the legislature give special emphasis to the development of financial assistance to help defray the high cost of dental education for minority students, especially those willing to serve in underserved areas of the state.

I wish to thank each of you for this opportunity to share some of the concerns and needs for the development of more reliable means to attract Black Texans to the dental profession and thereby impact the growing need for dental care among the state's underserved.